Supreme Court, U.S.
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No. 98-108

In The

Supreme Court of the United States

October Term, 1997

JAMES TRAVIS DAVIS and DONALD L. SHAW,

Petitioners,

versus

GLEN SHAVERS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

RESPONDENT'S BRIEF IN OPPOSITION

Counsel of Record for Respondent:

JOHN O. WIGGINS
Georgia Bar No. 757700

P.O. Box 790
Ringgold, Georgia 30736
(706) 935-3971

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT AND CITATION OF AUTHORITIES

A. INTRODUCTION

In their Writ presently before this Court, Petitioners contend that statements made in an Application for Recall are afforded an absolute privilege pursuant to the mandate of the First Amendment of the United States Constitution. In the alternative, Petitioners contend that Georgia's recall procedure must be deemed tantamount to a judicial proceeding and, as a consequence, afford them the privilege provided by O.C.G.A. § 51-5-8. For the reasons which follow, Respondent respectfully submits that both of these contentions are fundamentally flawed.

B. NEITHER A LITERAL READING OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION NOR A CONSIDERATION OF THIS COURT'S DECISIONS CONSTRUING THIS AMENDMENT YIELD THE CONCLUSION THAT AN *ABSOLUTE* PRIVILEGE EXISTS EVEN IN THE CONTEXT OF POLITICAL FREE SPEECH

Respondent respectfully submits that to adopt the thesis currently advanced by Petitioners that the First Amendment somehow contains an absolute privilege, notwithstanding the total absence of any verbiage authorizing such a conclusion, would necessarily require this Court to overturn thirty-four (34) years of well-established, deeply-entrenched constitutional law. The seminal case decided by this Court in the context of political free speech is *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964). Rather than holding that comments made

against public figures or public officials are never actionable, i.e., absolutely privileged, this Court enunciated for the first time the 'actual malice' standard. Respondent strenuously urges that the onerous actual malice evidentiary burden borne by public officials is sufficient to accommodate any legitimate concern regarding any chilling effect on political free speech.

Petitioners' assertion that few individuals will participate in a recall proceeding unless an absolute privilege is conferred upon them is a classic non sequitur. It simply does not follow that unless a disgruntled citizen is given the right to maliciously defame a public official with absolute impunity that such a citizen will refrain from participating in a recall effort any more so than a potential candidate for public office will refuse to run for an elected office because he or she cannot defame the incumbent with actual malice. Respondent adamantly maintains that Petitioners' assertion in this regard is, at best, unfounded conjecture.

Moreover, to supplant the actual malice standard in favor of an absolute privilege in the political free speech context would, itself, constitute a dangerous precedent. In a day and age when negative campaigning appears to be in vogue, the judicial embracement of an absolute privilege is wholly inconsistent with the public good or any legitimate public interest. Given the existence of the actual malice standard, the only 'policy' to be advanced by this Court's adoption of an absolute privilege would be that of judicially condoning defamations spoken or written about public officials with *actual malice*. (emphasis added). Respondent respectfully submits that

such a 'policy' ill serves the legitimate interests of either the citizenry or the democratic process.

We can be quite certain that if this Court deemed it constitutionally mandated to confer an absolute privilege in the heat of any election contest it would have done so in *New York Times v. Sullivan* and/or its progeny. It is equally indubitable that the actual malice standard remains viable by an analysis of subsequent decisions of this Court. See, e.g., *Harte-Hanks, Inc. v. Connaughton*, 491 U.S. 657, 105 S.Ct. 562 (1989) (upholding a libel judgment in favor of a public figure, an unsuccessful candidate for municipal judge).

Finally, the adoption of an absolute privilege would be equivalent to holding that the freedom of speech is, itself, 'absolute'. It has long been recognized that this is not the case. For example, in *Konigsberg v. State Bar of California*, 366 U.S. 36, 81 S.Ct. 997 (1961), this Court held:

> *"at the outset we reject the view that freedom of speech and association, as protected by the First and Fourteenth Amendments, are 'absolutes', not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment." Id. at p.49.*

Respondent adamantly maintains that there being no compelling reason to confer an absolute privilege, the instant Writ should be denied.

C. UNDER GEORGIA'S STATUTORY RECALL PROCESS, AN APPLICATION FOR RECALL IS NOT TANTAMOUNT TO A 'REGULAR PLEADING FILED IN A COURT OF COMPETENT JURISDICTION'. ACCORDINGLY, THE GEORGIA SUPREME COURT DID NOT ERR IN DENYING PETITIONERS THE PRIVILEGE AFFORDED BY O.C.G.A § 51-5-8.

First to be noted in addressing this alternative argument is that this issue does not involve either an application or interpretation of any Constitutional provision. Nor does this issue involve any federal question. And, finally, it does not appear that this issue otherwise satisfies any of the criteria for granting Certiorari under Rule 10 of this Court. On the contrary, this issue does involve the interpretation by the state court of last resort of a *state* statute. (emphasis added) Simply put, whether a particular proceeding constitutes a judicial or quasi-judicial proceeding in no way involves the United States Constitution or any federal question. Rather, this is solely a matter of state law.

Both Appellate Courts in Georgia have considered the issue of what constitutes a judicial proceeding. In *What It Is, Inc. v. Jackson,* 146 Ga. App. 574 (1978), the Georgia State Court of Appeals held as follows:

> *"In determining whether a proceeding is judicial in character, the question hinges not on whether the parties at interest were in fact given an opportunity to be heard but the test is whether the parties at interest had a right under the law to demand a trial in accordance with judicial procedures." Id. at p. 575; Accord, Southview Cemetery Assn. v. Hailey,* 199 Ga. 478 (1945) at p. 481.

Under Georgia's statutory recall process, the judicial inquiry is limited solely to the legal sufficiency of the application, i.e., do the facts alleged constitute a ground or grounds for recall. See O.C.G.A. § 21-4-6(f). [This statutory provision is set forth at App. 45 of Petitioner's brief]. Under this statutory scheme, the public official is prohibited from challenging the truthfulness of the allegations levied against him or her; is prohibited from engaging in discovery; is prohibited from introducing any evidence; and is prohibited from appealing an adverse ruling. O.C.G.A. § 21-4-6(f). Respondent adamantly maintains that such a scheme constitutes the antithesis of a judicial proceeding.

O.C.G.A. § 51-5-8 provides:

> *"All charges, allegations and averments contained in regular pleadings filed in a court of competent jurisdiction, which are pertinent and material to the relief sought, whether legally sufficient to obtain it or not, are privileged. However, false and malicious such charges, allegations and averments may be, they shall not be deemed libelous."*

An application for recall is neither a regular pleading nor is it ever filed in a court of competent jurisdiction. Moreover, false and/or malicious charges and allegations contained in pleadings filed in a court are, of course, subject to being disproven by facts and evidence presented by the person or party against whom these charges and allegations have been levied or made. As previously noted, this is not the case at all under Georgia's statutory recall scheme. Instead, there is absolutely no opportunity to be heard nor may the public official demand a trial in accordance with judicial procedure.

Accordingly, the Georgia Supreme Court was eminently correct in declining to afford Petitioners the privilege conferred by O.C.G.A. § 51-5-8. See also in this connection, *Fedderwitz v. Lamb*, 195 Ga. 691 (1943), holding that the class of absolute privilege is restricted to "narrow and well-defined limits." *Id.* at p. 696.

Georgia Law does provide for a privilege for "comments upon the acts of public men or public women in their public capacity and with reference thereto." See O.C.G.A. § 51-5-7(9). Allegations against a public official contained in an application for recall clearly fall within the purview of this statutory provision. Indeed, it is difficult to imagine a more glaring example of comments upon the acts of a public man in his public capacity than those set forth in the application for recall against Respondent in the case sub judice. However, the privilege afforded by O.C.G.A. § 51-5-7(9) is a *conditional* one. *DeLoach v. Maurer*, 130 Ga. App. 824 (1974) (emphasis added). Respondent respectfully submits that this construction by the Georgia appellate courts is wholly consistent with *New York Times v. Sullivan*, supra.

CONCLUSION

While the right to effectively and robustly criticize public officials is an admittedly cherished right, it is beyond serious debate that this right is, in and of itself, an absolute one. Respondent respectfully submits that it is wholly inconsistent with the public good to confer an *absolute* privilege and thereby enable anyone to defame a

public official or public figure with actual malice. Moreover, to confer an absolute privilege is wholly inconsistent with *New York Times Co. v. Sullivan* and its progeny.

To judicially condone defamations uttered or written with actual malice would be tantamount to opening a veritable Pandora's Box of sanctioning the usage of known and malicious lies against any and all public officials and public figures, past, present and future.

Respondent respectfully submits that the words of Presiding Judge Eberhardt of the Georgia Court of Appeals are particularly instructive on the issue at hand:

> *"There is no privilege protecting the use of calculated falsehood. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity . . . For the use of the known lie as a tool is at once at odds with the premise of democratic government and with the orderly manner in which economic, social or political change is to be affected. Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality'. Hence, the knowingly false statement and the false statement made with reckless disregard of the truth do not enjoy constitutional protection." See Thibadeau v. Crane, et al.*, 131 Ga. App. 591 (1974) at p. 595, (Cert. denied) citing *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

For any and all of the above and foregoing reasons, Respondent respectfully urges that the instant Writ should be denied.

Respectfully submitted,

JOHN O. WIGGINS
Attorney for Respondent
State Bar No. 757700

WIGGINS LAW OFFICE
P.O. Box 790
Ringgold, Georgia 30736
(706) 935-3971 – Phone
(706) 935-5606 – Facsimile